IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 10TH SEPTEMBER 2007 / 19TH BHADRA 1929

CRL.A.No. 114 of 2001()

CC.2/1997 of ENQUIRY COMMR. & SPL.JUDGE, KOZHIKODE

.....

APPELLANT:

M.M. KADIRIKOYA, S/O. MAMMUKOYA,
23/1468 a, JABALNOOR,
THIRUVANNUR ROAD, KOZHIKODE-29.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT :

STATE REP. BY THE DEPUTY SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI-CORRUPTION BUREAU, KOZHIKODE.

BY P.P.SRI. P.N.SUKUMARAN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.114 OF 2001-A

Dated this the 10th day of September, 2007.

JUDGMENT

The 2nd accused in C.C.No.2/1997 on the file of the Enquiry Commissioner and Special Judge, Kozhikode, is the appellant. The appellant and A1 were charge sheeted by the vigilance police for the offences punishable under Section 5(2) read with Section 5(1)(c) of the Prevention of Corruption Act, 1947 and Sections 409,467 & 120 B of the I.P.C. The prosecution case against the accused in the case was that while A1 was working as the Superintendent and A2, the appellant, was working as a clerk in the Regional Office of the Wakf Board, Kozhikode, during 1997, the Wakf Board framed a scheme as Kerala Wakf Board Social welfare Scheme and extended financial assistance to poor unmarried muslim women and in implementation of the scheme, applications were received from the respective applicants and after scrutinising the applications, the Sanctioning Committee on approving the applications, sanctioned Rs.500/- each to each applicants and in the above scheme, so many applications were received including that of Pws 3, 5 to 9, 14 and 20. But, it was alleged that though the applications of these applicants were

scrutinised and Ext.P26 series of cheques were issued, the cheque amounts were not received by the applicants and as the appellant being the clerk during the relevant time and had written some of the vouchers and the cheques and as the 1st accused had signed the cheques, they have misappropriated the amount and committed the offences as charged against them. To prove the case against the accused, prosecution examined 23 witnesses and placed reliance on Exts.P1 to P48. On closing the prosecution evidence, the accused were also questioned under Section 313 of the Code and they have denied the prosecution allegations and filed their statements. The appellant herein filed a statement to the effect that though he had written Ext.P26 series of cheques and filled up some of the vouchers, the amounts covered by the cheques had been not received by him and according to him, the amounts were received by the applicants through their agents or representatives and hence, the appellant pleaded that he is innocent. However, after considering the entire prosecution evidence, the trial judge found the appellant guilty under Sections 403 and 467 of the I.P.C and the appellant was convicted thereunder and sentenced to undergo R.I for one year under Section 403 and R.I for three years and a fine of Rs.8,000/= with default sentence of payment

of fine, to undergo a further period of R.I for six months under Section 467 of the I.P.C. It was further ordered that the substantive sentences shall run concurrently and if the fine is realised, that shall be paid to Pws 3, 5 to 9, 14 and 20 at the rate of Rs.1,000/= each. However, the trial court found the 1st accused was not guilty of any offences and the appellant was not guilty under Sections 409, 120 B of the I.P.C and 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act. The above judgment of the trial court is challenged in this appeal.

2. This Court heard the learned counsel appearing for the appellant and the learned Public Prosecutor appearing for the State. No appeal has been seen filed against acquittal of A1 or acquittal of the appellant in the other charges.

3. The learned counsel appearing for the appellant had challenged the judgment of the trial court on several grounds. Firstly, it is contended by the counsel that the trial court had misread the entire evidence adduced by the prosecution to find that the appellant had committed the offences punishable under Sections 403 and 467 of the I.P.C as the prosecution had not proved any proper

or legally acceptable evidence to come to the conclusion as arrived at by the court. Secondly, it is contended that the prosecution had not proved any evidence before the court to show that the appellant had dishonestly misappropriated any amount as alleged by the prosecution. Thirdly, the counsel submits that the investigating officers, who conducted the investigation of the case, had not properly investigated the case to collect evidence regarding misappropriation of the amount covered by Ext.P26 series by the appellant as the mode of misappropriation has not been properly proved. Finally, it is contended that as there is no evidence to prove that any document has been forged by the appellant, the offence under Section 467 is also not established. At the same time, the learned Public Prosecutor supporting the judgment of the trial court submitted that the prosecution has proved that the appellant was on the domain of the public money which was allowed under the scheme and there is evidence to show that the appellant himself had written Ext.P26 series cheques and some of the vouchers.

4. The question to be decided in this appeal is whether the finding entered by the trial court is justifiable or not. The prosecution case against the appellant and the 1st accused was that as

sanctioned by the sanctioning authority, an amount of Rs.500/= each has been granted to Pws 3,5 to 9, 14 and 20 and when the said amount has been sanctioned, it was the duty of the appellant and the 1st accused to get utilisation certificates from the applicants and as there was no utilisation certificate received in the office of the Wakf Board, an enquiry has been conducted through PW2. In the enquiry conducted by PW2, it has been revealed that the applicants namely Pws 3, 5 to 9, 14 and 20 have not filed any utilisation certificates of the amount allowed by the Wakf Board. Further it was the case that Ext.P26 series cheques and some of the vouchers produced before the court were in the handwriting of A2. However, as the applicants have given evidence to the effect at the time of enquiry made by PW2 that they have not received any amount on the basis of the vouchers on which cheques were granted by A2, the said amount might have been misappropriated by the appellant. To prove this case, Pws 1 and 2 were examined whose evidence would show that in the enquiry made by PW2, there was no utilisation certificate has been received from Pws 3, 5 to 9, 14 and 20 and hence it was concluded that the amount has been not received by these applicants. To prove this fact, Pws 3, 5 to 9, 14 and 20 were also examined. These witnesses were examined

and they had stated that they have not received the amount covered by Ext.P40 series of vouchers and other vouchers produced in the trial court and they have also stated before the court that they were not aware that anybody else has been received, for and on behalf of them, the cheques from the office of the Wakf Board. The trial court after considering the evidence of the applicants, found that though PW3 was given evidence before the court that she was not received the amount, she had admitted that her father might have received the amount for and on behalf of her. With regard to other applicants, they had stated that they have not received the amount covered by Ext.P26 series of cheques. However, they admitted that they were not aware whether anybody else have been received the cheques for and on behalf of them. Relying on the evidence of these witnesses and coupled with the evidence of Pws 1 and 2 and as these applicants have not produced any utilisation certificate or even attempted to produce the certificates from the respective mahals and authorities, the trial court came to the conclusion that the amount covered by Ext.P26 series and the vouchers produced before the court might have been misappropriated by the appellant. The trial court also found that A1 was not guilty of any of the offences as he was

only signed Ext.P26 series of cheques. But, the fallacy committed by the trial judge, in coming to the conclusion that the appellant had committed the offences punishable under Sections 403 and 467 of the I.P.C, is that there was no evidence before the court to prove that the appellant had misappropriated any amount on the basis of Ext.P26 series of cheques or had misappropriated the amount through any other mode or through any other persons. In this context, the case set up by the appellant in his Section 313 statement is relevant. In his 313 statement, the appellant had stated that as the amount has been allowed to poor women for their marriage purposes, there was no direction from the Wakf Board to issue the amounts to the applicants without making any inconvenience to them. Further the appellant had stated that as per the sanctioning order, it was specifically stated that women applicants may not be insisted to present to receive the amount. The amount covered by Exts.P26 series of cheques and the vouchers might have been received the representatives for and on behalf of the appellant. There was no evidence before the court to show that the cheques were written his on volition, whereas his case was that it was written on the direction given by A1. Apart from that, all the cheques were signed by A1 and it is also the case of the

appellant that the cheques ought to have been written by PW19 - the Cashier, only because of the direction given by A1, the Superintendent he had written Ext.P26 series of cheques. If so, as the prosecution had not proved that the amounts covered by the cheque were misappropriated by the appellant by utilising the same or by using the same his on mode, the prosecution cannot succeed that an offence has been proved against the appellant under Section 403 of the I.P.C. Further, the trial court itself had came to the conclusion that there was no evidence to prove the entrustment of the amount and if the entrustment is not proved, duty of the prosecution is to prove the mode of misappropriation of the amount by the appellant. To prove this fact, the prosecution had not even questioned any witness from the Bank from where all the cheques have been encashed. In this context, it is also to be noted that Ext.P26 series were the named cheques of each applicants namely Pws 3, 5 to 9, 14 and 20. The investigating officers namely Pws 22 and 23 had not conducted any investigation or collected any evidence to prove that the amounts covered by Ext.P26 series were collected by the applicants or that the amount was collected by the appellant through his own mode. In this context, the investigation made by the investigating officers is unsatisfactory and by that itself,

the prosecution cannot succeed that the appellant had committed an offence punishable under Section 403 of the I.P.C. Further, the allegation is that the appellant committed an offence punishable under Section 467 of the I.P.C. The trial court though found that Ext.P26 series were written by the appellant and some of the vouchers produced before the court have been written in the hand writting of the appellant, there was no evidence before the court to come to the conclusion that any account or any document has been forged by the appellant to commit misappropriation of any amount as alleged by the prosecution. There was no case before the court that entries have been made in the accounts of the Wakf Board regarding payment of the cheques to the applicants. To attract an offence under Section 467 of the I.P.C, prosecution should prove, by producing documentary as well as oral evidence, that the accused had misappropriated the amount covered by Ext.P26 series of cheques. In this context, the learned trial judge had not considered the dictum laid by the Apex Court in the decision reported in **Major S.K. Kale v. State of Maharashtra** (1997 SCC (Crl) 356). Though in that judgment, the Apex Court was dealing with an offence under Section 5(1)(b) read with Section 5(2), the Apex Court held that it was for the prosecution to prove the ingredients of Section 5(1)(d).

In other wards, it was for the prosecution to prove affirmatively that the appellant by corrupt or illegal means or by abusing his own position obtained any pecuniary advantage from some other person. Though the alleged offence is coming under Section 5(1)(d) same degree of proof should be adduced before the court to prove an offence punishable under Section 403 of the I.P.C. Further, the trial court had considered another judgment of the Apex Court reported in **Abdulla Mohammed Pagarkar etc. v. State (Union Territory of Goa, Daman and Diu)** (1980 Crl.L.J.220). In the above judgment, the Apex Court had held that the onus of proving of acceptance of every ingredients of charge always rest on the prosecution. In the above case, the charges against the appellant were under Sections 468, 471 and 5(1)(d) read with Section 5(2) of the Corruption of Prevention Act. In that judgment also, the Apex Court had held that the prosecution should prove by adducing legally acceptable evidence regarding the charge. The evidence now adduced before the court would only show that the appellant had written Ext.P26 series of cheques and some of the vouchers were also filled by him. But there was no evidence before the court whether vouchers were either signed by the appellant or any person acquainted with him or for and on behalf of the appellant.

In the above circumstances, the findings entered by the court against the appellant that he had committed the offence punishable under Section 403 and 467 of the I.P.C are not based on any legally acceptable evidence. The evidence now adduced by the prosecution may caste some doubt regarding disbursement of the amount on the basis of Ext.P26 series of cheques. But, what ever be the veracity of doubt, with doubt alone the appellant cannot be found fault with or punishable under any of the penal provisions.

In the above circumstances, findings of the trial court are perverse and the judgment is not sustainable in law. Hence, conviction and the sentences ordered against the appellant are set aside and the appellant is found not guilty of any offence. He is acquitted of all the charges. The bail bonds executed by the appellant shall stand cancelled.

K.THANKAPPAN, JUDGE.

cl

K. THANKAPPAN, J.

CRL.A.NO.114 OF 2001

JUDGMENT

10th September, 2007.